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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2050

UNITED STATES OF AMERICA, PETITIONER

v.

LUIS ANTONIO ORTIZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues that the Border Patrol's fixed traffic checkpoints in general and the San Clemente checkpoint in particular are unnecessary and ineffective elements in the Border Patrol's program for enforcing this country's immigration laws. That contention, however, is refuted by the evidence presented in the consolidated *Baca* proceeding. As the district court found, "[t]he evidence * * * clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol, in the absence of the checkpoints" (Pet. App. 20A). "[T]hey effectively deter large num-

bers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have" (*id.* at 18A).

Respondent asserts that checkpoints are unnecessary because they "are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States" (Br. 31). The existence of other enforcement techniques, however, does not make the checkpoints superfluous. Each of the Border Patrol's operations—the line watch, farm and ranch checks, transportation terminal surveillance, city patrols, crewman and stowaway controls, and traffic checks—has an important place in the total enforcement effort (see Tr. 28–29), and the effectiveness of each is dependent upon the existence of the others. If the highways were left unguarded, for example, the checking of train and bus terminals would be pointless, since illegal entrants would be free to travel inland in private vehicles without fear of detection and would thus be unlikely to use any other mode of transportation.

Motor vehicles are, in fact, the primary means by which illegal entrants travel to urban and agricultural job markets, and the record in the consolidated proceeding shows that traffic checkpoints are the principal hurdle to the inland movement of illegal entrants who have evaded the line watch (Tr. 123–124, 410). Deputy Chief Patrol Agent Batchelor testified that there is no feasible alternative to the checkpoints (Tr. 166). "Without those checkpoints there, we would be at a loss to say just what we would do" (*ibid.*).

Respondent asserts, however, that the manpower presently assigned to checkpoints could more efficiently be used as part of the line watch (Br. 37–41). The Border Patrol, he says, makes only a "token commitment" of manpower to the line watch (Br. 40) and makes "no real attempt at border apprehensions" (Br. 38). The facts are to the contrary. Acting Commissioner Greene testified (Tr. 29–30), and the district court found (Pet. App. 13A), that the line watch is the "first line of defense," responsible for apprehending 175,511 deportable aliens in fiscal year 1973. It also has highest priority for manpower. The Immigration and Naturalization Service informs us that more than half of all Border Patrol agents are currently assigned to the line watch function [1] and that traffic checkpoints in the Mexican border area use only 8.4 percent of the total force assigned to that area.[2]

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[1] Acting Commissioner Greene, stating that he did not have the information with him at the time of his testimony, estimated that "[m]aybe thirty percent" of the officers were assigned to the line watch (Tr. 88). We are informed by INS, however, that 50 percent is the correct figure.

[2] Respondent's assertion that "more personnel is devoted to the operation of inland checkpoints than to covering the border area" (Br. 39) appears to rest on his mistaken assumption that 20 officers are assigned to the line watch in the Chula Vista sector while 47 agents are stationed at the San Clemente checkpoint (Br. 39, n. 19). The record shows that 160 of the 270 agents assigned to the Chula Vista sector are in fact deployed on the line watch (Tr. 97). Only about two-thirds of the total force is available for assignment on any given day, and those agents are distributed over five overlapping shifts (Tr. 229). Moreover, the line watch demands less attention during daylight hours and on weekdays. Thus, Agent Batchelor testified that "[a]t this time of day, during the middle of the week, we

The record also reflects that, while more manpower is needed for each of the Border Patrol's functions, including the line watch, an increase in personnel on the border itself would not solve the problem of illegal entries. As the district court found, "[i]ncreased manpower on line watch would not make that activity appreciably more effective" (Pet. App. 14A); such an increase would by no means minimize the importance of the traffic checkpoints. It would require an enormous army of agents effectively to prevent unauthorized entries along the nearly 2,000 miles of the Mexican border. Chief Patrol Agent Felchlin estimated that he alone would need a complement of 21,000 officers to control illegal entries across the 75 miles of border in the El Centro sector (Tr. 393). That figure, of course, is only a fraction of what would be required to cover the entire 2,000 miles of the border. As Agent Batchelor testified, however, with anything less than blanket coverage along the entire border "a determined alien will keep penetrating, keep bouncing off of us and trying another spot" (Tr. 244).

In 1969, the Border Patrol together with other agencies participated in a 60-day experimental program to determine the effect on illegal entries and narcotics smuggling activities of adding substantial man-

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would have in the neighborhood of possible twenty men" on line watch (Tr. 229). The figure of 47 agents assigned to the San Clemente checkpoint—by far the largest of the Border Patrol's checkpoint operations—is the total complement for that checkpoint (Tr. 267), comparable to the figure of 160 assigned to the line watch. San Clemente can be operated with as few as five officers on a nighttime shift in the middle of the week and by as few as seven or eight on a daytime shift (Tr. 431).

power to the force on the line. Respondent says that the program demonstrated "the current ineffective border placement of officers" (Br. 40). The record shows just the opposite. Although the substantial publicity given the operation in Mexico appeared to deter some illegal border activity (Tr. 390), Agent Batchelor testified that the doubling of manpower at the line "had no noticeable effect" on the number of illegal entrants apprehended during that period at the checkpoints in the Chula Vista sector (Tr. 303), and Agent Felchlin stated that there was "a marked increase" in the number of apprehensions made at the checkpoints in the El Centro sector (Tr. 352). The operation apparently deterred some professional alien smugglers—"until they could see what was really going to develop" (Tr. 437)—but had little or no impact on individual crossings.

What "Operation Intercept" demonstrated is that ever a doubling of manpower on the line watch would not significantly reduce the need for traffic checkpoints as an essential secondary control (see Pet. App. 14A). It is not surprising, therefore, that if substantially increased manpower were made available to Agent Batchelor, he would deploy the officers in essentially the same way that his current force is deployed (Tr. 219–220).

Respondent's corollary argument is that the traffic checkpoints are ineffective in deterring illegal entry. "We have only to look around us at the millions of illegal aliens currently living and working in the United States to see that the deterrent value of inland immigration roadblocks has been negligible" (Br. 36).

The contention is a *non sequitur*. That millions of illegal entrants have evaded apprehension does not contradict the overwhelming evidence that the Border Patrol's traffic checkpoints are highly effective in deterring millions of others from entering this country unlawfully (Tr. 39, 161, 352). Agent Felchlin testified that the checkpoints in the El Centro sector are "one of the greatest deterrents that we have at our disposal" (Tr. 352). He based that judgment on interviews with illegal entrants apprehended in this country and upon information derived "from our intelligence sources in Mexico" (Tr. 353).

The checkpoints have made it costly for any potential violator to penetrate the border and move successfully inland to job markets. Many must pay professional smugglers $225 or more to be transported inland (Tr. 185, 411, 421; Pet. App. 19A). Since "the average income among Mexican nationals who may wish to seek residence here illegally is quite small, * * * this cost tends to act as a very significant deterrent in and of itself" (Pet. App. 19A). The elaborate smuggling techniques described by the district court (Pet. App. 18A–19A; see Tr. 132–138) have been developed principally to combat the checkpoints (Tr. 139), and an alien who pays a smuggler to assist him is buying a means of evading traffic checkpoints (Tr. 422). Agent Batchelor testified that "the smugglers would be out of business immediately if we didn't have the checkpoints" (Tr. 187).

Despite the elaborate efforts to evade them, the checkpoint operations apprehended 55,300 deportable aliens in fiscal year 1973 (Pet. App. 17A). This is

itself a significant figure, but it is not, of course, a fair measure of the effectiveness of the operations, for they are designed principally to *deter* illegal entry. The credibility of a deterrent cannot be assessed solely by reference to the number of violators who were apprehended; the more effective it is, the less productive it is likely to be. The Border Patrol's experience in operating checkpoints unexpectedly [3] or over unusually long periods [4] demonstrates that their operation indeed

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[3] Some smugglers know that the heavy volume of traffic on Interstate Route 5 on Sunday afternoons usually makes it impractical to operate the San Clemente checkpoint at that time. On one such Sunday afternoon, however, additional manpower was deployed at San Clemente, and the checkpoint was kept open. As Agent Batchelor testified, the results were impressive (Tr. 156):

"We made—seized twenty-one smuggling vehicles with loads at the checkpoint. They just blundered on in, and we had another twenty some odd vehicles abandoned south of the checkpoint. * * * Two days later, we were still rounding up aliens in Camp Pendleton that had left these vehicles and gone into Camp Pendleton."

A total of more than 300 illegal entrants were apprehended as a consequence of the Sunday operation (Tr. 158).

Similar results were obtained when the San Clemente checkpoint was closed down for a short period and then opened again (Tr. 408). Scouts had notified smugglers that it was safe to proceed north on Interstate Route 5, but the checking was resumed while they were en route, and the drivers "had no way of knowing that [the checkpoint] was put up until they reached it" (*id.*).

[4] Checkpoints cannot ordinarily be operated around-the-clock. On one occasion, however, the San Clemente checkpoint was operated continuously for five days, and smugglers were unable to transport illegal entrants on Route 5. When the "drop houses" began to overflow, some smugglers attempted to take a different, unfamiliar route and found themselves unexpectedly at the coordinate California checkpoint at Oak Grove. "[T]here

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acts as a powerful deterrent to the inland transportation of illegal entrants (Tr. 138–139, 149, 156–158, 408–409; Pet. App. 20A).[5]

2. Respondent contends that most of the Border Patrol's checkpoints are located further from the border than is necessary to accomplish their purpose (Br. 41–43). The record shows, however, that geographic considerations and the widespread fraudulent use of border-crossing identification cards make it necessary to place most checkpoints at least 25 miles from the border (*e.g.*, Tr. 32–33, 353; Pet. App. 16A). As

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were seven loads that they sent through Oak Grove and five of those loads were caught at the checkpoint" (Tr. 409).

Similarly, when Oak Grove was kept in continuous operation for three days, 80 illegal entrants were apprehended there during the first eight hours, including three smuggling cases (Tr. 149). Thereafter, apprehensions dwindled. Agent Batchelor testified that the dwindling effect indicated that "the unusual had occurred as far as the organized smugglers were concerned, and so they became completely inactive until they had a chance to evaluate what were we doing" (Tr. 149).

[5] Respondent asserts that the San Clemente checkpoint "captures only about 5% of the alien traffic traversing through it north on Interstate 5" (Br. 37). That figure rests on a questionable extrapolation from Border Patrol estimates of the number of illegal entries in the Chula Vista sector and the proportion of illegal entrants who travel inland on Interstate Route 5 (see Resp. Br. App. 5a–6a). It does not take account of the aliens who are apprehended by the line watch. But even if respondent's figures were accurate, they would not suggest that the checkpoint should be abandoned. It is inevitable that many illegal entrants will be able to pass through the checkpoint undetected, for the checkpoint cannot be operated 100 percent of the time, and the agents cannot inspect every vehicle that approaches. The fact remains, however, that the operation of that checkpoint is a highly effective deterrent to illegal entry (Tr. 408–410).

Agent Felchlin testified, "[s]trategically, the traffic check operations are located at the first possible location where we can effectively control the traffic out of the Imperial Valley" (Tr. 353). Professional smugglers commonly furnish their illegal entrants with illicit border-crossing cards by which to enter at a regular port of entry (see Tr. 404–405). Since those cards authorize the holder to travel up to 25 miles from the border, a checkpoint placed within that range would be ineffective in deterring the inland movement of the illegal entrant. Documentation authorizing travel beyond the 25-mile limit, however, is far more difficult for a smuggler to obtain (Tr. 420–421).

Moreover, the immediate border area is generally unsuitable for traffic control operations because there are too many roads to cover effectively and because such operations would disrupt commuter and shopper traffic. Agent Batchelor testified that if checkpoints in the Chula Vista sector were placed within a mile or two from the border, "it would be havoc" (Tr. 162). "The normal business of this metropolitan area here could not be conducted" (*ibid.*). Even if checkpoints were placed five miles from the border in that area, it would require twelve stations to do the job accomplished now by three and would still require the checking of far more traffic, including 'bumper to bumper" commuter traffic, than is checked at existing stations (Tr. 162–163). Agent Felchlin testified to the same effect with respect to the El Centro sector (Tr. 321–322).

3. Respondent argues that checkpoint operations are subject to a "high potential for abuse" (Br. 50). All vehicles that pass through the San Clemente checkpoint, he says, are "stopped initially for a visual examination of the occupants and interior of the vehicle by the point officer" (Br. 21),* whose decision to refer the vehicle to the secondary inspection area for inquiry as to the citizenship of the occupants and possible physical inspection of the vehicle may be made "for other than proper reasons" (Br. 51). Respondent further states, without any support whatsoever, that "referrals to the secondary area for interrogation and search are based upon skin color" (Br. 53).

The Acting Commissioner of INS was subjected to cross-examination in the consolidated proceeding concerning this point. He testified that skin color and

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*The evidence in the consolidated proceeding does not clearly answer the question whether all vehicles are brought to an initial stop (see Tr. 184–185). For the Court's convenience, we have reproduced in the appendix to this reply brief, *infra*, p. 1a, an official Border Patrol photograph of the San Clemente checkpoint (as well as one of the State Highway 86 checkpoint (p. 2a) involved in the consolidated *Bowen* case). Although, as the San Clemente photograph shows, the point officer stands behind a stop sign facing oncoming traffic, we are informed by INS that the traffic is slowed to about five miles per hour at the checkpoint and, apart from the vehicles referred to the secondary inspection area, nearly all are waved through by the officer without a stop. See, for example, the facts in *United States* v. *Evans*, C.A. 9, No. 74–2095, decided October 23, 1974, which involved the pursuit and stop of a vehicle after an officer at the Oak Grove checkpoint in California, while waving the vehicle through without a stop, saw two persons who appeared to be Mexicans lying on the floor in the space behind the front seat.

racial characteristics are not the basis for referrals to the secondary inspection area (Tr. 73–75):

> Q. Is it not true that the Border Patrolman looks for those who are dark with Latin features?
>
> A. No. I wouldn't say that.
>
> * * * * * *
>
> Q. Now, have you discussed with current Border Patrolmen, the type of person that they stop for questioning?
>
> A. I have.
>
> Q. And have you not learned that frequently they stop persons who look Latin?
>
> A. No. I think that you have to look at the total picture, whether the car—whether it is tilted, whether the driver—or after he has looked at him, talked to him, whether he proceeds to go on questioning.
>
> Q. Now, isn't it true that many persons are not stopped for conversation at all?
>
> A. That's true.
>
> Q. Those people are simply waved through?
>
> A. That's true.
>
> Q. But some are stopped for some sort of discussion, isn't that true?
>
> A. True.
>
> Q. And aren't those the people who tend to look Mexican? That is, with black hair and darker features?
>
> A. Not necessarily.
>
> Q. By "not necessarily" does that mean no?
>
> A. I'll say no.

The decision to refer a vehicle for secondary inspection does not depend, as respondent claims, on the Latin-American appearance of its occupants. That

is not to say that Border Patrol officers ignore the complexion and physiognomy of the occupants of a vehicle. They are, after all, looking almost exclusively for illegal Mexican entrants, and it would affront common sense to expect that facial appearance or skin color would play no part in arousing their suspicions. Those factors are not, however, the "key criteria used by the point officer in referring occupants and their vehicles to secondary" (Resp. Br. 53, n. 25).

Border Patrol officers, relying on their experience and professional judgment, look instead for "visual signs" (Tr. 272) of possibly illegal immigration activity. Some of the factors that may suggest a "break in the pattern" of normal traffic (Tr. 325) and that may arouse a seasoned officer's suspicion are reflected in the record of the consolidated proceeding. These include the number of persons in the vehicle, the behavior of the driver and passengers, their inability to speak English, the responses they give to any questions asked by the officer, the nature of the vehicle, and indications that the vehicle may be heavily loaded (Tr. 324–325, 380–383, 434). The officer also takes into account the time of day or night and traffic conditions (Tr. 324, 380, 434).

The Immigration and Naturalization Service has informed us that experienced Border Patrol officers look for persons with the characteristic appearance of Mexican residents, an appearance that distinguishes those persons from the thousands of Mexican aliens who lawfully reside in this country and the thousands of American citizens of Mexican ancestry. Illegal Mexican entrants commonly appear thin, their hands

are rough and work-worn, their hair is cut in a characteristic fashion, and they are frequently dressed in full-cut and coarsely-woven material. Experience has shown, we are told, that illegal entrants may exhibit obvious nervousness or affect excessive nonchalance as they approach a checkpoint.

The driver of a vehicle containing illegal entrants may also contribute to a break in the usual pattern of lawful traffic. The officer is alert to inconsistencies between the appearance of the driver and the appearance of the passengers or the nature of the vehicle, the driver's failure to slow the vehicle, and any erratic stopping or slowing of the vehicle suggesting nervousness. Suspicion may also be aroused if the driver attempts to answer questions addressed to his passengers.

Finally, the vehicle itself may indicate the possibility of illegal alien activity. Foreign license plates may be evidence of Mexican residence; a spare tire or excessive clothing or baggage in the rear seat area may suggest the presence of concealed persons in the trunk of an automobile; a vehicle riding unusually high, low, or stiffly may indicate that the trunk is heavily loaded or that the car is equipped with overload springs.

These are some of the factors that may lead an agent to refer a vehicle for secondary inspection, but it is not an exhaustive list. It is impossible to identify all the circumstances that might arouse the suspicion of an experienced Border Patrol officer. Moreover, agents must rely occasionally upon what Agent Batchelor referred to as a "sixth sense" (Tr. 431). To function effectively as a deterrent to illegal entry,

a checkpoint must pose a serious obstacle to the professional smuggler as well as the individual violator. Since, as respondent argues, many thousands of illegal entrants are able to evade detection at the checkpoints despite the agents' conscientious efforts to identify suspicious vehicles based upon articulable factors, it is apparent that some otherwise innocent-appearing vehicles in fact carry illegal entrants. If those intent on violating the immigration laws of this country could be confident that a carefully disguised vehicular smuggling operation would be immune from a random or "sixth sense" inspection at a checkpoint, the deterrent would be significantly undercut.

4. It follows, we submit, that the warrant procedure envisioned by respondent would either severely weaken the deterrent effectiveness of checkpoint operations or provide no significant additional protections. Assuming that a judicial officer could fashion a warrant "delineating with specificity those criteria upon which a Border Patrolman may act in directing vehicles off the highway into a secondary area for interrogation and search" (Br. 63), what "criteria" would be delineated? Would an effort be made to incorporate all the considerations that in fact influence a Border Patrol officer's judgment, including an element of intuition or randomness? If so, the warrant would simply authorize a continuation of the practice that has been followed without a warrant. Would it simply forbid officers to refer a vehicle for secondary inspection on the basis of a "sixth sense"? If so, for the reasons we have indicated, the effectiveness of checkpoint operations would be diminished. Would the

"criteria" be limited to facts amounting to particularized founded suspicion or probable cause? If so, the checkpoints would be emasculated, for it is a rare case in which a point officer's brief glimpse at a vehicle can reveal sufficient facts to constitute traditional probable cause to believe that it contains illegal entrants.[7]

It is true, as respondent states and as our opening brief indicated, that warrants have been issued for some checkpoints in the Southern District of California. It is equally true, however, that those warrants do not attempt to "delineat[e] with specificity those criteria upon which a Border Patrolman may act" (Resp. Br. 63). They simply authorize the Border Patrol officers "to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles" (Resp. Br. App. 2a).[8]

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[7] One such rare case is illustrated in the appendix to this reply brief, *infra*, pp. 11a and 12a. The photographs, which were introduced in evidence in the consolidated proceeding in the district court, show a vehicle visibly carrying a large number of persons crowded together (which turned out to be 27 illegal entrants). More commonly, however, concealed aliens are found in the trunk of an automobile, as in the present case, or in specially designed compartments of vehicles, as in the cases illustrated on pp. 3a–4a, 7a–10a, *infra*. Occasionally, an illegal entrant will be discovered under the hood of an automobile (pp. 5a–6a) or even under the chassis (p. 12a). (Each of these official Border Patrol photographs was also introduced in evidence in the district court.)

[8] Warrants issued from June 22 to July 11, 1974, also authorized Border Patrol officers at checkpoints "to conduct a routine inspection of said vehicles for the presence of aliens"

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Respondent says (Br. 66–67) that the issuance of these limited checkpoint warrants and the government's willingness to seek such warrants answers the argument in our opening brief (pp. 38–40) that the interrelationship between the various checkpoints would make it difficult to fashion a workable warrant procedure. It should be obvious, however, that the government has sought the issuance of warrants only because the Ninth Circuit held that checkpoints could not be operated without warrants. What the government's actions reflect is not a belief that the procedure is workable, but only a recognition that a checkpoint system of reduced effectiveness is still more useful for law enforcement purposes than no checkpoint system at all.

5. Respondent repeatedly states (Br. 6, 10, 58–59) that the Fifth and Tenth Circuits, like the Ninth, have ruled that warrantless checkpoint searches are unlawful in the absence of probable cause. The Fifth Circuit's decision in *United States* v. *Speed*, 497 F. 2d 546, pending on the government's petition for a writ of certiorari, No. 74–599, involved a pre-*Almeida-Sanchez* search at a "temporary" checkpoint and purports to rest on the pre-*Almeida-Sanchez* law of the circuit. The decision squarely conflicts in that respect, however, with decisions of other panels of the Fifth Circuit that have upheld convictions based on evidence

(Resp. Br. App. 2a). Warrants issued thereafter, however, have omitted the "inspection" authority. The result is that checkpoint operations under the warrants have been limited to interrogation stops; searches for aliens have been conducted only with consent or on the basis of probable cause.

seized in pre-*Almeida-Sanchez* checkpoint searches. *United States* v. *Phillips,* 496 F. 2d 1395; *United States* v. *Cook,* 492 F. 2d 747; *United States* v. *Merla,* 493 F. 2d 910.

Moreover, another panel of the Fifth Circuit recently held, after an exhaustive review of all the prior Fifth Circuit decisions in this area, that a warrantless, non-probable-cause search of a vehicle for aliens at the Border Patrol's permanent checkpoint at Sierra Blanca, Texas, was reasonable under the Fourth Amendment. *United States* v. *Hart,* No. 73-3949, decided January 15, 1975. The court stated (slip op. 2532):

> At permanent checkpoints, the commitment of time, money, personnel, and the administrative decision for location of the search are all presumably such as to remove to a large extent the individual arbitrariness that might be available to roving agents. * * * A permanent checkpoint does not have the constitutionally frightening aspect of a roving patrol * * *.[9]

The Tenth Circuit's decisions in *United States* v. *King,* 485 F. 2d 353, and *United States* v. *Maddox,* 485 F. 2d 361, held that a warrantless checkpoint

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[9] Although the court concluded that the Sierra Blanca checkpoint is the "functional equivalent" of the border, its application of that term was far broader than the Ninth Circuit's definition and quite similar to that of the district court in the consolidated proceeding in this case. The Fifth Circuit specifically "reject[ed] the idea that every vehicle must be shown to have probably crossed the border to be legally stopped at the Sierra Blanca checkpoint, however important that element might be to the kind of thorough search that can be made at an international boundary" (slip op. 2533-2534).

search without probable cause could be lawfully conducted only at the "functional equivalent" of the border, but it did not define that term. Instead, it remanded the cases to the district court to determine whether the Border Patrol's permanent checkpoint at Truth-or-Consequences, New Mexico, 98 miles from the border, is the functional equivalent of the border.[10] The lawfulness of warrantless searches of vehicles for aliens at that checkpoint has thus not yet been decided by the Tenth Circuit.

Respectfully submitted.

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FEBRUARY 1975.

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[10] The very distance of that checkpoint from the border suggests that the Tenth Circuit at least open to a far more expansive definition of the "functional equivalent" concept than the Ninth Circuit has accepted or than we have contended for before this Court in the instant case.

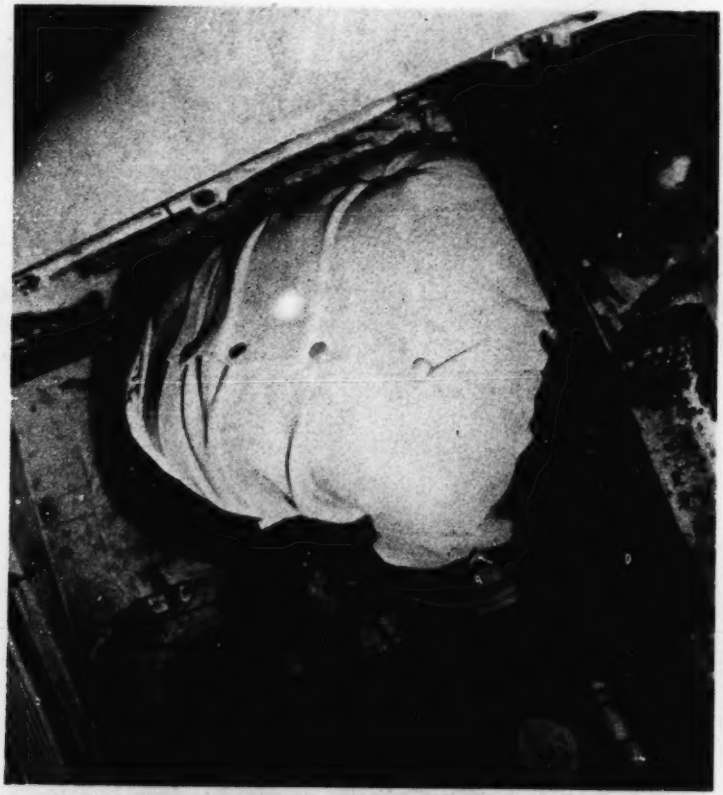
San Clemente Traffic Checkpoint

State Highway 86 Traffic Checkpoint

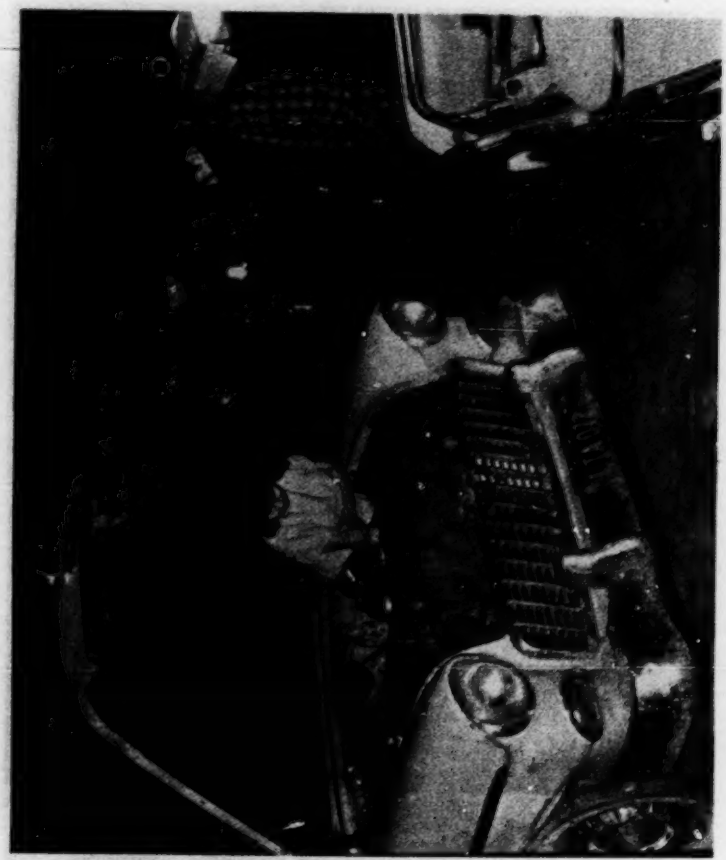
3a

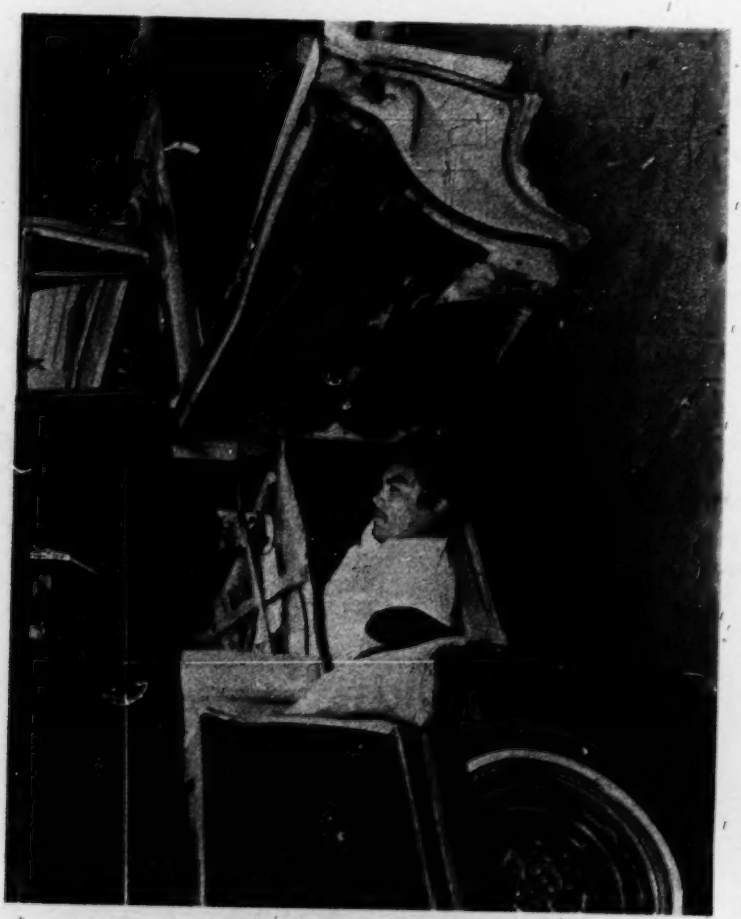
4a

5a

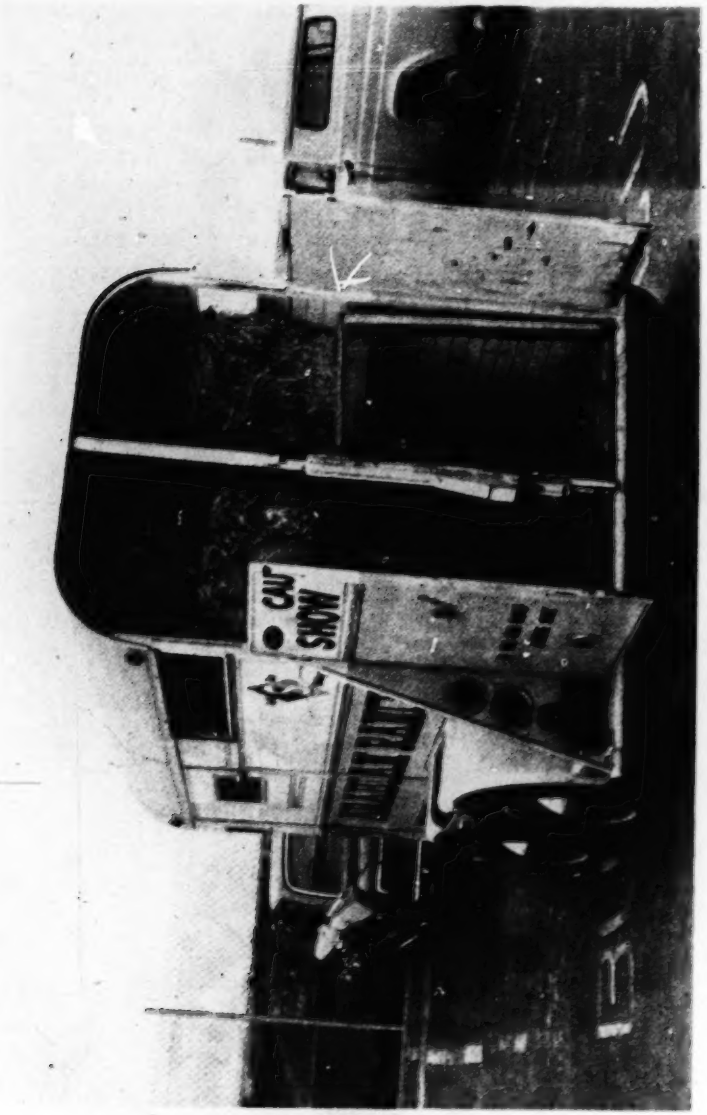


6a





CAUTION
SHOW HORSES
ARABIAN RANCH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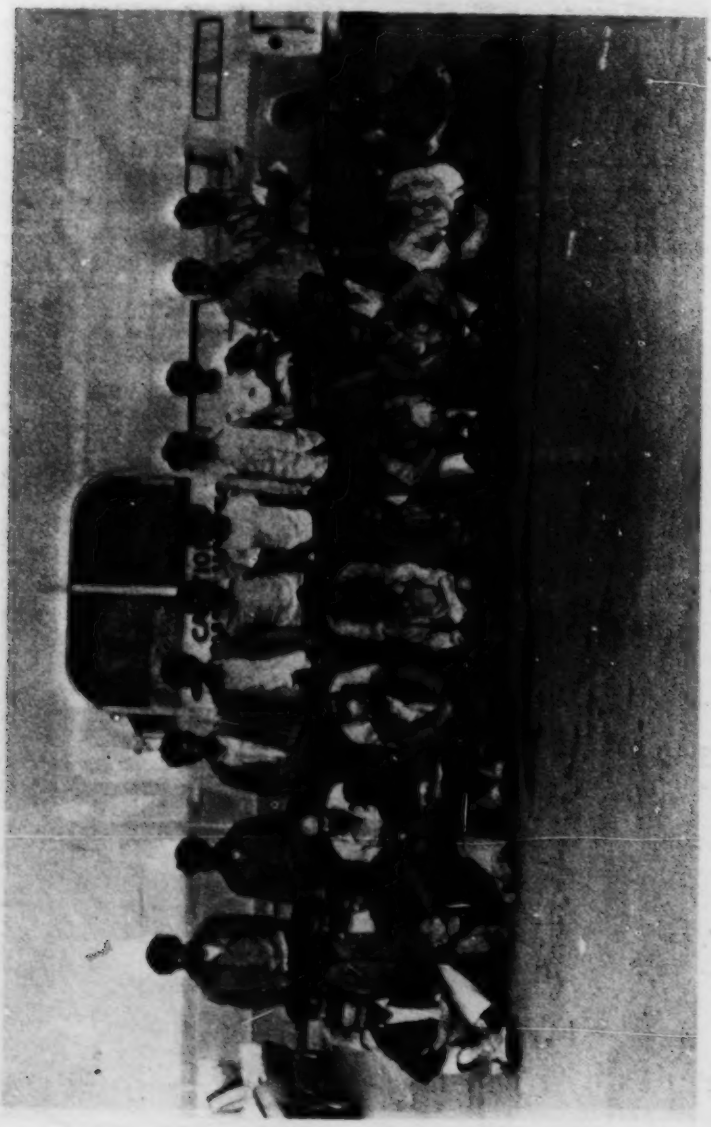

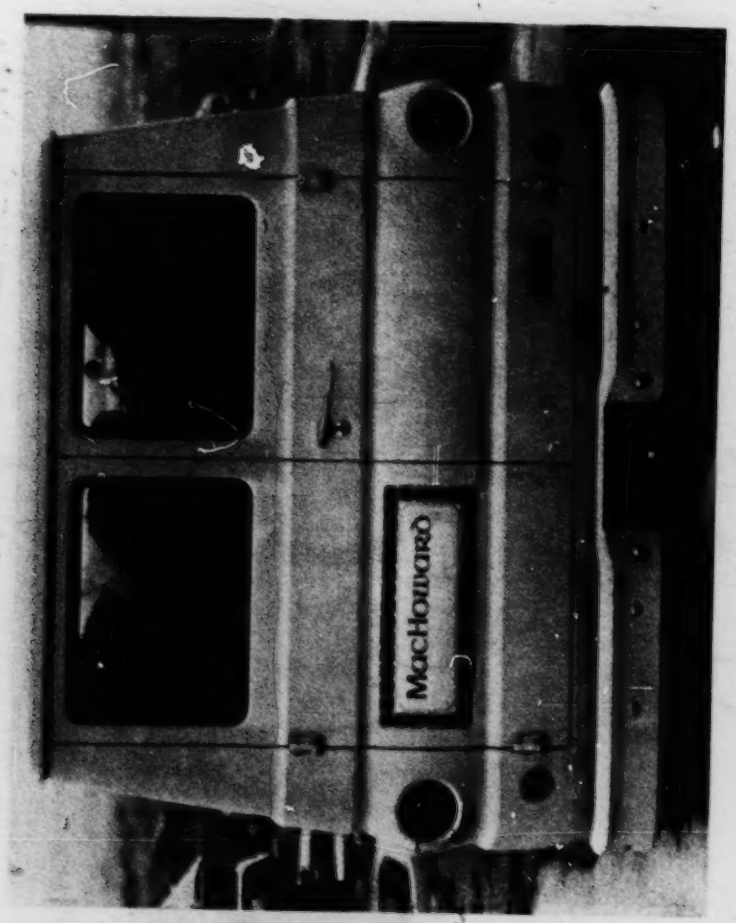
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